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THE NEED, THE PROPRIETY AND BASIS OF MARTIAL LAW, WITH A REVIEW OF THE AUTHORITIES¹

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THE NEED

The experience of individual man has been and will continue to be that occasions will arise in his life when a defense of his person and property by force is an absolute necessity. Communities of men have had, and will continue to have, the same experience. The ideal of government expressed by the great lawyer, David Dudley Field, is only an ideal, the attainment of which now seems farther off than ever before. It is as follows:

"A self-balanced and self-governed state, where every man stands erect in the fulness of his rights and the pride of his manhood, neither cringing nor overbearing, owing no allegiance but to duty, claiming none but from the heart, filling every service and exercising every right of the citizen; a government founded, not on the traditions of remote ages, not on usurpation, not on conquest, but on things firmer and older than all—the equality and brotherhood of man."

The men who framed and adopted our present constitution recognized that while it was essential that the war-making power should be in the general government, that the several states would from time to time face conditions that would make it absolutely necessary to defend themselves, and by a constitutional provision reserved to the several states the right of self-defense.³

The exercise of this right against organized rebellion, or a foreign state, is war. An incident to the exercise of this right by a state within its own territory in case of war or insurrection is the right to declare and apply martial law as a domestic fact.⁴

Martial law has been declared and exercised in six states in the past three years,⁵ and as a result there has been a great deal of discussion in the press about the extent to which it has been used. Some writers and public men have questioned the necessity of the measures used under it, and others have taken the broader ground that martial law as a domestic fact cannot exist in the United States,

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³Art. 1, Sec. 10, Par. 3, U. S. Constitution.

⁴Hallecks International Law, Vol. 1, page 508.

⁵West Virginia, Colorado, Ohio, Montana, Galveston, Texas, and Atlanta, Georgia.

under the Constitution of the United States, or of any of the several states—contending that the military forces of either national or state government can only be used in the aid of and not independent of the civil authority, citing as authority for this position the case of *Elva v. Smith*, Mass. 5 Gray, and *Frank v. Smith*, Ky. 53 L. R. A., (N. S.) 1141.

The first case was one in which the military was called out for the express purpose of assisting the marshal, who was attempting to execute a process under the fugitive slave law, and the question of the right to declare or enforce martial law was not considered, and does not support this contention.

In *Frank v. Smith* (*supra*)⁶ disturbances brought about by persons banded together under the name of "Night Riders" were not suppressed by the local authorities, and the Governor ordered out the militia. There was no proclamation of martial law, or declaration of a state of war. The commander of the military forces directed that persons traveling through the country after night should be investigated, and if found suspicious to be arrested and held for the civil authorities. The plaintiff, traveling with a number of other persons along the road just about midnight, had a pistol in the buggy in which he was riding. He was arrested by the defendant under the belief that he was guilty of carrying concealed weapons, detained until the morning following, turned over to the civil authorities, and then released. He afterwards brought suit for damages, recovered a verdict before a jury, and the case went to the Supreme Court of Kentucky, who affirmed the judgment of the lower court.

The case turned upon the constitutional provision that the military shall at all times be in strict subordination to the civil power, and while it tends to sustain this theory, it must also be borne in mind that the court, in its opinion, stated:

"Of course we have not in mind a state of case in which actual war * * * exists, as it would be entirely beyond the scope of the questions we are considering to venture an opinion, much less lay down any rule of action for the government of military forces operating in the territory where a state of war actually prevailed."

This admission in the face of the constitutional provisions is an admission that conditions could exist that would make it necessary for the executive to exercise power in the discharge of his constitutional duties *greater than those permitted* by this decision. The de-

⁶Approved and followed in *Fluke et al v. Canton-Adjutant Gen. Oak.*, 123 Pac. 1049. Contempt proceedings against Adjut. Gen. acting under Governor's orders in controversy over re-location of county seat.

cision, as a whole, is in conflict with the weight of authority, and will not bear analysis, the court holding that the constitution makes the Governor commander-in-chief of the militia, charges him with the duty of seeing that the laws are faithfully executed, and that this power cannot be controlled by the courts, as it is a power belonging to a co-ordinate branch of the government, and the constitution forbids one department to exercise any powers of either of the other; that the request of the civil authorities is not necessary to enable the Governor to call out the militia under a statute making it his duty to do so when he may deem it necessary for the safety of the commonwealth, or, in the case of invasion, insurrection, domestic violence, etc.; that the Governor, in the exercise of this constitutional and statutory power, acts as a civil and not as a military officer, and must direct its movements and operations in accordance with law, when the constitution provides that the military shall at all times be in strict subordination to the civil power—that a member of the militia thus called out is not justified in obeying the order of his superior officer to make an arrest that would be in excess of the powers which might be exercised by a peace officer of the state.

In effect, it holds that the Governor, as a co-ordinate branch of the government, is charged under the constitution with certain duties and invested with powers to perform those duties; yet, in the method of performance, the Court, and not the Governor, decides how these duties are to be performed. This is in conflict with the decided cases.⁷

In the course of its opinion the court stated:

"In ordering out and controlling the movements of the state militia the Governor is answerable only at the bar of public opinion, unless it be that abuses might warrant impeachment proceedings, it cannot for a moment be entertained that the governor must delay action until requested by the local authorities. This limitation upon his constitutional duty would, in many instances, deny him the right to take prompt and decisive action and suppress threatened or actual disorders or violence, and enforce obedience to the law. It would interfere with the express authority conferred upon him by the statute, and would in many instances and many places be disastrous to the peace and welfare of the state. Primarily the enforcement of the law is with the local civil authorities, but at times they are too weak to control the lawless element that exists in every society, and at other times they might be in sympathy with the forces who want to take the law into their own hands; but whatever the reason what may exist for the failure or inability of the local civil authorities to suppress violence and disorder, when it comes to pass that they cannot or will not do it, then it is not only the right, but the plain duty of the governor to act."

⁷*Martin v. Mott*, 12 Wheaton 19. Prize Cases, 2 Black, 636. *McCullough v. Moreland*, 4 Wheaton 314.

In the case at bar the civil authorities had not acted, and the Governor, acting under express power, was attempting to control a lawless element. His action in this connection was a political act, or the action of a co-ordinate branch of the government.

The court concludes:

"We have reached the conclusion that any military order, whether it be given by the governor of a state or the officer of the militia, or the civil officer of the city or county, that attempts to invest either officers or privates with authority in excess of that which may be exercised by a peace officer of the state, is unreasonable and unlawful."

Apply this doctrine to the action of the President in Colorado in issuing his proclamations of May 1st and May 6th, 1914, and under which proclamation officers and men of the United States army disarmed persons residing within the proclaimed districts. Every officer or soldier who disarmed such citizen, unless there was an express statute authorizing such action, was liable in an action of trespass to the person so injured. It is true that the court, in its opinion, leaves a loop-hole to meet such a situation: "of course, we have not in mind a state of case in which actual war exists." But would it hold that the civil disorder in Colorado was a state of war, and the actions under the proclamation authorized, or would it accept as final the declaration of the political departments of the government that a state of war existed? This, of course, is not a practical question so far as the Federal authorities were concerned, as doubtless the Federal courts would follow the doctrine laid down in the case of *Moyer v. Peabody*.

The court, in holding that the order was without lawful authority and did not protect a subordinate officer, is in conflict with a recognized rule that a subordinate is required to obey and is not excused in obeying an order from his superior, "unless the act was manifestly beyond the scope of his authority, or was such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him if he acted in good faith and without malice."⁸

These cases, therefore, will not sustain the contention that the military can only be used in aid of civil authority, and not independent thereof.

The contention that the military can only be used in aid of civil authority assumes that there is always a civil authority in the disturbed districts to be supported, and loses sight of a condition that

⁸*U. S. v. Clark*, 31 Fed. 711. *McCall v. McDowell*, Fed. Cases, 8673. *Riggs v. State* (Tenn.), 91 Am. Dec. 272. *State ex rel Wadsworth v. Shortall*, 206 Pa. 65 L. R. A. 193.

frequently exists, and which has to be dealt with, e. g.: In Idaho, after some six or seven years experience, seeing that the execution of the laws in Shoshone County, through the ordinary and established means and methods, was practically impossible, the Governor proclaimed martial law and with the aid of Federal troops restored order.

In Colorado, in 1913 and 1914, no attention was paid to the courts or the civil peace officers whatever, and there was a case of repression of the civil law.

Still another condition is frequent where the disorder is of such proportions that practically every man, woman and child is a partisan on one side or the other, with the remainder of the population afraid to take any stand for fear of personal violence from one of the other factions, the local magistrates and constables active partisans, and as was said by one magistrate in such a district, that he was at home and was within one hundred and fifty yards from the scene when a battle took place between contending factions, which lasted about thirty minutes, and in which battle perhaps one thousand shots were fired, "that he knew nothing about it, heard nothing about it, that he had lived at his present home twenty years, and had never seen a hostile blow struck."

With clashes between contending factions frequent and violent, lives being lost, persons assaulted, property destroyed, the county and local officers affording no protection to person or property, but declaring their inability to cope with the situation, and that they had and could get no evidence against the law-breaker, to ask if the state must depend upon or look alone to local authorities under these conditions, and has no power within itself to take hold of the situation and protect life and property, admits of but one answer.

To contend that the force used to restore order is only to be used in aid of an authority that has made no effort to maintain law and order, and in some cases is partisan enough not to want law and order, is to make an effort doomed in advance to failure, and, as was said by the United States Supreme Court:

"If the inhabitants of the state, or a great body of them, should combine to obstruct interstate commerce or the transportation of mails, prosecution for such offences had in such a community would be doomed in advance to failure, and if the certainty of such failure was known, and the national government had no other way to enforce freedom of interstate commerce and the transportation of mails than by the prosecution and punishment for interference

⁹Statement of operations of the court submitted by Gov. Ammons to M. D. Foster, Chairman of Mines and Mine Committee, Washington, D. C.

therewith, the whole interest of the nation, in this respect, would be at the mercy of a portion of the inhabitants of that single state."¹⁰

At the time of writing this article the Mexican situation is acute, and the newspapers are carrying reports of serious disturbances in certain border counties of Texas. The Secretary of State is quoted as saying that the internal disturbance in Texas is a problem for the state government.

Conceive of a county made up of partisans who are strong enough to dominate and do dominate the county officers and who would fail to enforce the law, would the State of Texas sit by and take no steps to suppress local disorders, other than to send into such county its military force and make arrests, and then turn the persons so arrested over to their friends to be promptly released to make further trouble?

When the Governor of Colorado called upon the President in 1914 for Federal troops to maintain law and order in his state, the President, in one of his communications to the Governor, expressed his surprise that "a state should surrender its sovereignty so willingly."

It is clear that a state needs this power, and Article 1, Section 10, Cl. 3, of the Constitution of the United States; viz:

"No state shall engage in war unless actually invaded, or in such imminent danger as will not admit of delay,"

does not take away from the state its war-making power, but, upon the contrary, recognizes that the states originally possessed it, and in adopting the Constitution did not surrender it entirely, but limited its use to actual necessity. This view was taken by the Supreme Court of the United States.¹¹

This need of the state is not new. It does not grow out of modern conditions, and it is believed that this power has not been taken away or limited by the Fourteenth Amendment.¹²

THE PROPRIETY

The need for martial law, whether it is founded on necessity, or is an incident of the war-making power inherent in a sovereign state, we believe must be conceded. Its propriety, meaning thereby its being put into effect, is a political question which must be decided by the proper department of the state or nation, usually the executive. The executive who makes this decision is in the same position as the man who is called upon to exercise his right of self-defense—who decides a question fraught with great moment to himself. The man

¹⁰In *re Debs*, 158 U. S. 534.

¹¹*Luther v. Borden*, 7 Howard 1.

¹²*Moyer v. Peabody*, 212 U. S. 79.

who strikes in self-defense answers before a jury, who judges his act from the circumstances as they appeared to him when he acted; the executive who declares martial law is liable to impeachment if he acts improperly,¹³ and, in all events, when quiet is restored, he is tried at the bar of public opinion. A large part of such opinion, for the time being, is based on reports that have no foundation in fact, and upon criticisms made by persons "who think in votes" and have not been careful to inform themselves as to all the facts. Disagreeable as this is, it serves a good purpose, as no executive will, except as a last resort, adopt martial law measures, for the obvious reason that, right or wrong, his action will subject him to much adverse criticism.

The propriety of martial law being a political question, the measures and steps to enforce it rest also with this branch of the government. Under our system of government, i. e., with the three co-ordinate branches, it seems anomalous to say that the executive department of a state government has the power of detention in time of insurrection or riot, and that the persons detained who petition the court for a release upon habeas corpus and are "remanded to the military authorities, have leave to repetition after thirty days, if at that time they have not been delivered to the civil authorities."¹⁴

This holding would seem to take from the executive the power to decide the necessity of detention, and at the end of thirty days, upon re-petition, put upon the executive the burden of showing to the court that the necessity continued to exist. Yet how would this proof be made, and would it admit of a traverse? If so, this does away with a co-ordinate branch of the government, and substitutes a judicial discretion in place of the executive discretion, and would seem to be in conflict with the decided cases.¹⁵

THE BASIS

Chief Justice Chase, in the *Milligan* case, 4 Wallace, page 142, in discussing military jurisdiction, held:

"That there are, under the Constitution, three kinds of military jurisdiction:

1. * * * *.

2. * * * *.

3. While the third may be denominated martial law proper, and is called into action by Congress, or temporarily when the action of Congress cannot be invited, and in the case of justifying or excusing peril by the President in time of insurrection or invasion, or of civil or foreign war, within districts or

¹³*Frank v. Smith*, 53 L. R. A., N. S. 1154.

¹⁴*Ex parte McDonald*, Montana 143, Pacific 947.

¹⁵*Martin v. Mott*, 12 Wheaton 19, 2 Black 636. *Ex parte Moore*, 64 N. C. 87. *In re Moyer*, 36 Col. 160. *In re Boyle*, 6 Idaho 609.

localities where ordinary law no longer adequately secures public safety and private rights."

This power has been designated as martial law at home, or as a domestic fact, and is the subject dealt with in this paper.

Chief Justice Chase finds the basis for the exercise of this power by the general government under the constitutional powers to raise and support armies and to declare war, and Mr. Justice Swain, who wrote the majority opinion, holds that the occasions when it can be properly applied are limited to actual necessity.

The adoption of the Constitution of 1787 by the several states created a government sovereign in its sphere, and while its powers were enumerated, it must of necessity have what it has since asserted; the inherent power in itself to preserve itself, and to carry out the powers granted. The states, in adopting the Constitution, did not divest themselves of their sovereignty, or limit their powers, except as expressly set out therein. It is true that the trend of things now is to look to an increase of the power of the national government, and to limit the powers of the state; but with this fact this article has nothing to do. We disagree with the theory that has been urged that the states, as such, have no power to declare martial law as a domestic fact, and believe the authorities show that it is as necessary for a state as for the United States, and the exercise of this power finds its justification, in both cases, in the same source.

Different writers, in discussing the *Luther v. Borden* case, have attempted to raise a doubt as to what the court meant when it held "that the right to declare and apply and exercise martial law is one of the rights of sovereignty;" that martial law is an indefinite term and that the Court probably did not mean what it held. Although there has been confusion in the use of this term by certain writers and in some instances by courts, for a great number of years prior to the decision in this case, the subject had received the attention of courts and text writers, and its definition fixed:

"Martial law is the law that depends upon the just and arbitrary power of the King or his lieutenant in time of war; for, in war, by reason of the great danger arising upon small occasions, he useth absolute power."¹⁶

"Martial law is an arbitrary law originated in emergencies, regulated by the expediency of the moment, and extending to all the inhabitants of a place or country."¹⁷

"Martial law is a temporary government controlled by military authority

¹⁶Quotation from Smith Rep. Aug. Lib. II, 03, cited in Blunt's Law Dictionary and Cowell Edition 1670.

¹⁷Dr. Wooster's Dictionary.

of territory in which, by reason of war or public disturbance, the civil government is inadequate to the preservation of order and enforcement of law.”¹⁸

So it is safe to assume that the court, at the time of deciding the *Luther v. Borden* case, understood the term “martial law” in the same sense in which it is understood at this time.

The exercise of this power has been, and we venture to suggest will be, the basis of much contention between those entrusted with the power and responsibility of government in troublesome times, and publicists and text writers, with the result that it will continue to be used, from time to time, when the occasion arises, it matters not from what source it is derived or how it is justified.

English lawyers and publicists are divided upon the question of martial law as a domestic fact, one group insisting that martial law as a domestic fact has no place in England since the Petition of Rights, and urge in support of this theory that Lord Mansfield, in his speech in Parliament at the time of the Lord George Gordon riots stated that there was no martial law, but that the military was acting within its common law powers. This same line of reasoning is followed by Sir Frederick Pollock, who submits:

“So-called martial law as distinct from military law is an unlucky name for the justification by the common law of acts done by necessity for the defense of the commonwealth, when there is war within the realm. Such acts are not necessarily acts of personal force or restraint. They may be preventive as well as punitive.”

And he concludes:

“First, that there may be purely a common law justification for acts being otherwise trespasses, done in time of war within the realm, on the ground of public defense.

Second, the person justifying such act must show that he acted in good faith.

Third, there must be a reasonable and probable cause, according to the apparent urgency.

The justification of any particular act done in a state of war is ultimately examinable in the ordinary court.”¹⁹

This reasoning would seem to lead to the same result as martial law as a domestic fact, with the exception that the necessity for its exercise is ultimately a question for the courts, and not a political question.

The other school of lawyers and publicists contend that the Petition of Rights declared the exercise of martial law in time of peace unlawful; that when the courts are closed and the civil authorities

¹⁸40 Cyc. 787.

¹⁹XVIII Law Quarterly Review, 152.

are unable to maintain law and order, the Crown has the power to declare a state of war to exist. In support of this position the Wolf Tone case, relied upon by the first school of lawyers, is shown to be a case arising, not in time of war, but in a place remote from the scene of hostilities, and after the rebellion was over, and that the conviction, under either theory, was clearly illegal; that Governor Wall's case did not arise under a place or time of war, but under the statute relating to the discipline of the army, and he was convicted upon the issue whether he had acted in good faith under the belief of a mutiny or on mere pretext and malice; that the legality of martial law has been recognized by acts of Parliament in 1798; that at the time of the Lord George Gordon riots:

"The privy council was convened, at which not cabinet ministers alone, but all who had a seat, were desired to attend. The King himself was present. Irresolution still prevailed; nor was anything decisive or effectual suggested. The counsel had risen when the King anxiously demanded if no measures could be recommended. The Attorney General answered that he knew but of one—that of declaring the assembly rebellious, and authorizing the military to act when necessity required, although the magistrates should not attend. The King desired him to make up the order, which he did at the table on one knee, and a proclamation was drawn up, and orders from the Adjutant General's office issued accordingly."²⁰

The military, under this act or proclamation, commenced to put a stop to outrages, and in doing so killed something like four hundred people. The day following the House of Commons declined to proceed to business, under the notion that London was subjected to martial law.

During the present German-English war, under date of November 27, 1914, the following article appeared in the newspapers:

"London, Nov. 27.—Viscount Haldane, Lord Chancellor, gave assurance during the session that between now and the reassembling of Parliament, no British civilian tried by court martial would be deprived of life. The subject was raised by Earl Loreburn, who moved and amendment to the Defense of the Realm Bill, to provide that a British civilian, charged under the act, should have the right to demand trial by the ordinary civil court. Viscount Haldane pointed out that the amendment would kill the bill, and Earl Loreburn withdrew it upon the above assurance being given him."

From this action it would seem that the House of Lords does not regard martial law as a domestic fact as having been abolished in England, although its use has not been necessary for many years. Both schools of thought seem to be agreed upon one point: whether

²⁰Adolph's History of England, Vol. 3, pp. 246-54.

martial law exists as a domestic fact, or whether it is exercised under the common law right, the power finds its justification in necessity.

In the recent decision of the case *In re Marias*, decided in 1902, the Privy Council considered a case arising under martial law in South Africa, and adopted the views contended for by the minority opinion in the case *Ex Parte Milligan*, i. e.:

"That the area now affected by war, the area over which martial law is a necessity, and because of that necessity lawful or excusable, is much larger and much more extended than was the case prior to the increased facilities afforded for locomotion by railways and other improved modes of travel, and prior to the improved modes of transmitting information and orders by telegraph and light."

This case distinctly puts an end to the ancient rule that because for some purposes the courts are open at a place, that place must be held to be where peace exists, no matter what the actual facts may be.

THE UNITED STATES.

Martial law had been invoked in the Colonies prior to the Revolution. Sir Thomas Dale used it at Jamestown in the beginning of that colony; Sir William Berkeley after Bacon's Rebellion; General Gage declared martial law at Boston in 1775, and Lord Dunmore in Virginia at the same time;²¹ General Washington at Valley Forge in 1776; Lord Cornwallis in Georgia and the Carolinas in 1780. The State of Virginia, by an Act of the General Assembly passed May, 1780, declared that martial law should be in effect within ten miles from the lines of its armies, and provided for the trial of civilians, and also provided that in case of any insurrection within that commonwealth, or if the same should be invaded by the enemy, "that person or persons within the same, who act as guides, spies, or who shall furnish the enemy with provisions or necessaries," and certain other offenses, should be tried by court martial;²² and this in the face of the fact that it had a constitution that contained a guarantee of a jury trial by a jury from the vicinage. These acts were enforced in the State of Virginia in 1780 and 1781, as will appear from the trials of certain civilians by courts martial found in the manuscript of State Papers in the State Library at Richmond.

The Confederate States exercised and enforced martial law throughout the Confederacy, and particularly within the City of Richmond.²³

²¹10 Hen. Statutes at Large, pages 311, et seq.

²²Richardson's Documents and Papers of the Confederacy.

²³Burk's History of Virginia, 4th Volume.

It may be contended that these facts are not authority under our present constitution, and while that may be conceded, they certainly go to show that men who are acquainted with the English law and constitutions recognize that martial law was a part of the system to be appealed to when necessary. The Massachusetts Legislature declared martial law at the time of Shay's Rebellion. Its present constitution provides that martial law can only be declared by its Legislature.

Martial law was declared by General Jackson at New Orleans in 1815. This declaration was considered in the case of *Johnson v. Duncan*, 6 Am. Dec., 675, and 3 Martin. In this case a motion that the court might proceed with the hearing of the case at bar was resisted, and one of the grounds of such position was:

"That the City (New Orleans) and its environs were by general orders of the officer commanding the military district put on the 15th of December last under strict martial law."

The court held:

"The power of the President, under the Constitution, to call out the military forces of any part of the Union, in case of invasion, may be exercised by his delegate, as commanding officer, in a particular district, and all citizens subject to military rule at that time may be thereby placed under military law; but this is the extent of martial law, and all beyond it is usurpation."

In the course of its opinion the court stated:

"It is therefore our opinion that the authority of the courts of justice has not been suspended of right, by the proclamation of martial law, nor by the declaration of the General of the Seventh Military District that the City of New Orleans was a camp, and we now repeat what we declared when the subject was discussed, 'that the powers vested in us by law can be suspended by none but legislative authority.'"

Compare the views therein expressed with the letter from Chief Justice Chase, of the Supreme Court of the United States, addressed to the President of the United States, under date of Washington, October 12, 1865:

"I so much doubt the propriety of holding Circuit Courts of the United States in states which have been declared by the executive and legislative department of the national government to be in rebellion, and therefore subjected to martial law—before the complete restoration of their broken relations with the nation and the supercedure of military by civil administration—that I am unwilling to hold such courts in such states within my circuit, which includes Virginia, until Congress shall have had an opportunity to consider and act on the whole subject. A civil court in a district under martial law can only act by the sanction and under the suspension of the military power, but I cannot think it becomes Justices of the Supreme Court to exercise jurisdiction under such condition. In this view, it is proper to say that Mr. Justice

Wayne, whose whole circuit is in the rebel states, concurs with me. I have had no opportunity to confer with other justices.”²⁴

The Rhode Island Legislature declared martial law at the time of Dorr’s Rebellion, and as the result of it the case of *Luther v. Borden*, 7 Howard, was decided by the Supreme Court with a dissenting opinion by Judge Woodbury. The majority opinion held:

“The right to declare and apply and exercise martial law is one of the rights of sovereignty, and is as essential to the existence of the state as the right to declare or carry on war. * * * The power is essential to the existence of every government, essential to the preservation of order and every institution, and is as necessary to the states of this Union as to any other government. The state itself must determine what degree of force the crisis demands.”

Justice Woodbury dissented, and discussed at great length the constitutional guaranties and rights of the individual, but at page 83 of his opinion admits the right to declare martial law in the theatre of actual war, or of civil disorder, holding:

“But in civil strife they are not to extend beyond the place where insurrection exists, nor to the portion of the state remote from the scene of military operations.”

In 1856 the Territorial Governor of Washington Territory declared martial law, and the question of his authority to do so was submitted to Mr. Cushing, then the Attorney General of the United States, who arrived at the conclusion that the Territorial Governor did not have this power. In 1885 and 1886, in the same territory, in an illegal uprising against the Chinese, which resulted in riot and disorder, the then Territorial Governor declared an insurrection to exist, and placed the territory under martial law. The President of the United States approved the Governor’s action, and issued a proclamation stating that the case which has arisen justified, and required under the Constitution of the laws of the United States, the employment of military force to suppress violence and enforce the faithful execution of the laws, and sent Federal troops into the territory for this purpose.

When the Civil War was commenced in 1861, the real test of the stability of this government came. Could the government sustain itself, and did it have, under the Constitution, the power to exercise belligerent rights against those who were in truth and fact citizens of the United States? In the Prize Cases, 2 Black, the right of the government to blockade the Confederate states was challenged, and

²⁴See *In re Marias*. Cases 3621-a, Federal Cases—*In re Davis*.

the rights to seize and capture as prizes of war goods belonging to persons within the limits of the Confederate states were denied by four judges. The majority held that war actually existed and the sovereign may exercise both belligerent and sovereign rights.

It must be borne in mind that in times like those judges were human, and in many instances saw the cases from the standpoint of party politics, and that while many of the acts of the officers of the general government in the conflict of the war, when brought before the court, were not sustained, it will be shown that in every case in every court the right to declare and enforce martial law, under some circumstances, was recognized. The cases follow:

In re Kemp, 16 Wisconsin, 383, held:

"The power suspending the writ of habeas corpus under the first section of Article 9 of the Constitution, is a legislative power; and is vested in Congress, and the President had no power to suspend the writ," but held:

"Martial law is restricted to and can only exist in those places which are the actual theatre of war and their immediate vicinity and it cannot be extended to remote districts. * * * But if, owing to the disloyalty of the magistrates, or the insurrectional spirit of the people the laws cannot be enforced or maintained, then martial law takes the place of civil law in such district whenever there is sufficient military force to execute it."

Jones v. Seward, 40 Barber, N. Y., 63, a case arising out of the arrest and imprisonment of the plaintiff by order of Mr. Seward. It is a terrific arraignment of the exercise of arbitrary power, but admits that the Commander-in-Chief may exercise the right of martial law within the theatre of military operations.

Johnson v. Jones, 44 Ill. An action of trespass brought by Johnson and others against Jones for an arrest made of the plaintiff by the defendant in the State of Illinois, and the plaintiff was taken by force to New York and there imprisoned for a time and afterwards taken to the State of Delaware and there imprisoned at Fort Delaware.

The defendants justified their action under a plea that they were United States Marshals and that the plaintiff was engaged in aiding a society in treasonable purposes. The court held:

"The President had no rightful power, in the time of peace, to cause an arrest of a citizen of one state, without process and convey him to another state and there imprison him without judicial writ or warrant in a military fortress."

"Martial law is not law, in any proper sense, but merely the will of the military commander, to be exercised by him only on his responsibility to his

government or superior officer, and when once established it applies alike to citizen and soldier."

"Martial law must be permitted to prevail on the actual theatre of military operations in time of war, is an unavoidable necessity resulting from the very nature of war."

"The commanding officer may arrest persons, whether citizen or alien, under authority of martial law, whom he finds within his lines giving aid or information to the enemy, and detain him so long as may be necessary for the security or success of his army."

"The government may be justified in treating a district as virtually attached to the theatre of military operations, and in enforcing martial law therein so far as may be necessary to the public safety, if in a district remote from the theatre of military operations the popular sentiment is so disloyal to the government that one who aids and abets the public enemy cannot be rendered powerless, and brought to justice by the arm of the civil law. Exercise of martial law can be defended upon no ground beyond its enforcement on the actual field of military operations, which is the result of an overmastering necessity, and its establishment in districts which, though removed from the seat of war, are yet so far in sympathy with the public enemy as to obstruct the administration of laws through the civil tribunals, and rendering a resort to military power a necessity, as the only means of restraining disloyalty from overt acts and preserving the authority of the government. War does not, of itself, suspend at once and everywhere, the constitutional guaranties of liberty and property. Martial law cannot be resorted to in that part of the country where the civil courts, in the midst of loyal communities, are exercising their ordinary jurisdiction, although the government may be prosecuting a war for the suppression of rebellion in other parts of the country. Persons arrested in such loyal community and deprived of his liberty by order of the President * * * without legal process, for alleged disloyal practices therein, such arrest will be unlawful."

Griffin v. Wilcox, 21 Indiana, 1863, a case in which a provost marshal arrested a man not in any way connected with the army, for retailing liquor in his usual place of business to soldiers. The court held the defendant liable to the arrested party for damages, but held:

"The President had a right to govern through his military officers by martial law, when and where the civil power is suspended, by force. In all other times and places the civil excludes the martial law, and that it is a right exercised precisely upon the point on which self-defense justified the use of force by individuals."

In the matter of *Martin*, 45 Barber, 143, Supreme Court of New York, Leonard, Judge, held:

"When necessity arises, the military power is paramount, and the laws are silent."

McLaughlin v. Graham, 50 Miss., decided in 1874, held the com-

manding officer liable for the destruction of certain liquors, and held, in finding that martial law may rightfully obtain:

"It is limited to the theatre of actual military operations, when no civil authority remains and there is a necessity to furnish a substitute to preserve the safety of the army and society, and martial rule shall only prevail until the laws can have their free course."

In re Vallandigham, Circuit Court of the United States, Southern District of Ohio.

In 1863, Mr. Vallandigham, a resident of the State of Ohio and a citizen of the United States, was arrested in that state under the order of the military commander thereof, taken to Cincinnati and arraigned before a military commission on a charge of having expressed sympathies for those in arms against the government of the United States, and for having uttered in a speech in a public meeting disloyal sentiments, opinion, etc., with the object and purpose of weakening the powers of the government in its efforts for the suppression of an unlawful rebellion. The President, in commutation of the sentence, directed the commander to send the prisoner, without delay, to the headquarters of General Rosecrans, to be by him put beyond the military lines, which order was executed.

The Court held:

"The commander of a military department, as the agent and representative of the President, in time of civil war, has authority, under the Constitutional provisions making the President the commander-in-chief, even in a locality where martial law is not in force, to arrest citizens not in the military or naval service, for mischievous acts of disloyalty which impede or endanger the military operations of the government. Such arrests are justifiable on the ground of military necessity, and of the existence of that necessity the commanding general is the exclusive judge, and the courts have no authority, by writ of habeas corpus, to inquire into it."

Vallandigham petitioned the Supreme Court of the United States for a writ of certiorari, to the Judge Advocate General of the United States. The court declined the writ on the ground that a military commission is not a court within the meaning of the Judiciary Act, and that there was no jurisdiction in the Supreme Court to issue a writ of habeas corpus ad subjiciendum to review or reverse, or the writ of certiorari to revise the proceedings of a military commission.²⁵

The Court, in the course of its decision, used the following language:

"As to the President's actions in such matter, and those acting in them

²⁵1 Wallace 243.

under his authority, we refer to the opinions expressed by this court in the case of *Martin v. Mott*, 12 Wheat., 29, and *Dynes v. Hoover*, 20 Howard, 65."

The last point in the syllabus of the latter case:

"If a court martial has no jurisdiction over the subject matter of the charge it has been convened to try, or shall inflict punishment forbidden by the law, though its sentence be approved by the officers having revisory power over it, civil courts may, in an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give redress."

Did the court mean to intimate that it disagreed with the holding of the Circuit Court, and that Vallandigham would have been entitled to recover from the defendants in an action of trespass for false imprisonment?

In re Eagan, Federal case 44303, a man tried by a military commission in the State of South Carolina, petitioner was discharged upon a habeas corpus, upon the ground that the commission was without jurisdiction, on account of the re-establishment of the civil courts before the commission of the offense and the trial. The court held:

"Martial law is the will of the general who commands the army. It can be indulged in only in cases of necessity, and ceases when necessity ends."

Ex parte Milligan, decided in 1866, involved the trial and conviction by a military commission of Milligan, who was arrested in the State of Indiana, in which there was no war and had not been, and in which the courts were not only sitting, but absolutely unobstructed in the exercise of their powers. The majority held:

"It will be borne in mind that this is not a question of the power to proclaim martial law when war exists in a community and the courts and civil authorities are overthrown. * * * Martial law cannot arise from a threatened invasion. The necessity must be actual and present, the invasion real, such as will effectually close the courts and dispose of civil administration. * * * It follows from what has been said on this subject that there are occasions when martial rule can be properly applied. If in foreign invasions or civil war the courts are actually closed, and it is impossible to administer criminal justice according to law, then in the theatre of actual military operations where war really prevails there is a necessity for substitute for civil authority thus overthrown."

The minority held:

"Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine to what State or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety."

It will be seen that this case does not decide that martial law

as a domestic fact cannot exist in the United States, but clearly recognizes the right of martial law under the conditions set forth in the opinion. James A. Garfield, of counsel for the petitioner, made the same distinction.

In North Carolina, by reason of certain disorders brought about by the activities of persons known as the Ku Klux Klan, the Governor of North Carolina declared the counties of Alamance and Caswell to be in a state of insurrection. His action came before the Supreme Court of North Carolina in application for a habeas corpus in the cases of *Ex parte Moore* and *Ex parte Kerr*, found in 64 N. C. 807-816. The Court held:

"The constitution and statutes empowered the Governor to declare a county in a state of insurrection whenever in his judgment the civil authorities are unable to protect its citizens in the enjoyment of life and property. The Governor, as was declared in regard to the County Alamance, and the judiciary, cannot recall his actions in question or review them, as the matter is confided solely to the judgment of the Governor but the writ of habeas corpus has not been suspended by the Governor, and ought not to be."

The Court then admitted its inability to enforce the writ.

It is submitted that the holding of this case would have harmonized with the decision of the Supreme Court of the United States in the *Moyer v. Peabody* case, and with the weight of authority, if it had held that the return of the Governor to the writ was sufficient, and that the detention, under the conditions shown to exist was legal. If the first part of its holding is not sound, it seems that this conclusion would necessarily follow.

In re Commonwealth ex rel Wadsworth v. Shortall, 206 Pa., 65 L. R. A., 193.

In this case the court held that a condition of qualified martial law exists where the Governor called out the militia and directed it to restore order, when rioting and disorder existed by reason of a strike, and that on such occasions the authority of the civil officers of the government is subordinate to that of the military, and the military, while on such duty, are in active service for the suppression of disorder and violence, and their rights and obligations must be judged by the standard of actual war, although their acts are subject to the review of civil authorities, which is not the case where actual war exists, and a military officer charged with the duty of suppressing a riot cannot be punished by the civil authorities for acts which at the time seem necessary for the accomplishment of his mission.

The court, in reaching this conclusion, adopted the view held by

Lord Mansfield and Sir Frederick Pollock, i. e., the justification by the common law of acts done by necessity for the defense of the commonwealth; and the court, in the course of its opinion, recognized the condition as it actually existed, and defined what it means by a qualified martial law :

“Qualified in that it was to be in force only as to the preservation of public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law are still open, and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose, it was martial law, with all its powers. The government has and must have this power or perish. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property.

It is not unfrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration, this is an error. There may be peace for all the ordinary purposes of life, and yet a state of disorder, violence, and danger in special directions, which, though not technically war, has in its limited field the same effect, and, if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called. When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force. * * * * But if the situation goes beyond county control, and requires the full power of the state, the Governor intervenes as the supreme executive, and he or his military representative becomes the superior and commanding officer. * * * * The resort to the military arm of the government, therefore, means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military, and then have them stand quiet and helpless, while mob law overrides the civil authorities, would be to make the government contemptible, and destroy the purpose of its existence.

The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful. * * * * There is no real difference in the commander's powers in a public war and in domestic insurrection. In both he has whatever powers may be needed for the accomplishment of the end, but his use of them is followed by different consequences. In war he is answerable only to his

military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts, and by civil action at the instance of parties aggrieved."

The court then proceeds to discuss the standards by which the rights and obligations must be judged, holding:

"While the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war. No other standard is possible,"

that the subordinate officer, acting in obedience to the orders of his commander, is excused unless the act were manifestly beyond the scope of his authority, or were such that a man of ordinary sense and understanding would know that it was illegal, provided he acted in good faith and without malice. Applying this doctrine to the case at bar, the prisoner was discharged.

It is submitted that the reasoning of this case squares with the doctrine of justification under the common law; i. e., the facts being established, the court found, as a matter of law, that they were justified on the ground of necessity. A note to this case found in 65 L. R. A., indicated that this decision is not in harmony with the *Ela v. Smith*, *supra*, and the Coit case in Ohio, and states that when local authorities refrain from doing their duty, it has necessitated a change in the strict rule of the last mentioned cases, "and compelled the courts to enlarge the powers of the head of the military when called out by the civil executive to suppress such rebellion or insurrection." It might be asked, from what source the court gets the authority to enlarge the powers of the military.

In re Boyle, Idaho, 45 L. R. A., 833.

The Governor by proclamation set out at length the conditions that existed in Shoshone County, and had existed for six years past; that the civil authorities did not appear to be able to control the situation, and declared the County of Shoshone in the State of Idaho to be in a state of insurrection and rebellion. Afterwards, upon the call of the Governor, a military force was sent into Shoshone County by the President of the United States, which proceeded to arrest the persons believed to have been engaged in the disorders. Among the persons arrested was the petitioner. The petitioner, in his petition, based his claim to be discharged from arrest upon the ground that no insurrection

"That no insurrection now exists in Shoshone County; that the Governor had no authority to proclaim martial law or suspend the writ of habeas corpus;

that martial law does not exist in Shoshone County and has not been proclaimed by anyone having authority to make such proclamation; that the little disturbances of April 29th were over; that the parties implicated in it, after having destroyed about a quarter million dollars of property and committed several murders, had retired to their homes, and that, in recognition of the inalienable rights of the citizens they ought not to be disturbed; that the Governor had no right or authority to send an agent or representative to Shoshone County to consult and advise with the military forces sent there by the Federal Government to assist in putting down the insurrection."

The court held that the truth of recitals of alleged facts in the proclamation issued by the Governor, proclaiming a certain county in the state to be in a state of rebellion and insurrection, will not be inquired into or reviewed on application for writ of habeas corpus; that the said proclamation of the Governor and his action in calling to his aid the military forces of the United States for the purposes of restoring good order, and the supremacy of the law, had the effect to put into force, to a limited extent, martial law in said county, and such action is not in violation of the constitution, but in harmony with it, being necessary for the preservation of the government, and in its necessary self-defense, and that in case of insurrection or rebellion the Governor, or the military officer in command, for the purpose of suppressing the same, may suspend the writ of habeas corpus, or disregard the writ, if issued.

The court, in the course of its opinion, said:

"In such case the government may, like an individual, acting in self-defense, take those steps necessary to preserve its existence. If hundreds of men can arm themselves and destroy vast properties, and kill and injure citizens, thus defeating the ends of government, and the government be unable to take all needful and necessary steps to restore and maintain order, the state will then be impotent, if not entirely destroyed, and anarchy placed in its stead. It is not argument to say that the executive was not applied to by any county officer of Shoshone County to proclaim said county to be in a state of insurrection, and for those reasons the proclamation was without authority. The recital in the proclamation shows the existence of one of two conditions, namely, that the county officers in said county, whose duty it was to make said application, were either in league with the insurrectionists, or else in fear of the latter said officers refrained from doing their duty. * * * It having been demonstrated to the satisfaction of the Governor, after some six or seven years experience, that the execution of the laws in Shoshone County through the ordinary and established means and methods, was rendered practically impossible, it became his duty to adopt the means prescribed by the said statute for establishing in said county the supremacy of the law, * * * and it is not the province of the court to hinder, delay or place obstructions in the path of duty prescribed by law for the executive, but rather to render him all the aid and assistance in their power to bring about the consummation most devoutly prayed for."

In re. Moyer, 35 Col. 159; 85 Pacific, 190.

Prior to the arrest of the petitioner there had been industrial disturbance in San Miguel County, which has assumed such proportions that the Governor, by proclamation, determined and declared the county to be in a state of insurrection, and the military officers of the State of Colorado sent into the county for the purpose of restoring order, arrested the petitioner, and were detaining him upon the ground that he was aiding and abetting in insurrection. Upon petition for a writ of habeas corpus to the Supreme Court of Colorado, the writ was issued and the return made thereto, and the Court, denying the writ, held:

"That the recitals in the Governor's proclamation establishing martial law in a county in the state, that a state of insurrection existed there, cannot be controverted in a habeas corpus proceeding to secure the release of one arrested by the military authorities; that the acts of the Governor in exercising his constitutional power to suppress insurrection, cannot be interfered with by the court so long as he does not exceed the power conferred upon him, and that the military, in suppressing an insurrection under the Governor's orders, may, without turning them over to the civil authorities, seize and detain insurrectionists and those aiding and abetting them until the insurrection is suppressed, and that such seizure and detention of insurrectionists by the militia, when acting under the orders of the Governor to suppress insurrection, does not violate the constitutional provision that the military shall always be in strict subordination to the civil authority, since the act of the Governor is in his civil capacity.

The crucial question, then, is simply this: Are the arrests and detention of petitioners narrated illegal? When an express power is conferred, the necessary means may be implied to exercise it which are not expressly implied or prohibited. Laws must be given a reasonable construction, which, so long as possible, will enable the end thereby sought to be obtained. So with the constitution. It must be given that construction of which it is susceptible, which will tend to maintain and preserve the government of which it is a foundation, and protect the citizens of a state in the enjoyment of their inalienable rights. * * * * If, as contended by counsel for petitioner, the military, as soon as the rioter or insurrectionist is arrested, must turn him over to the civil authorities of the county, the arrest might, and in many instances would, amount to a mere farce. He would be released on bail and left free to again join the rioters or engage in aiding and abetting their action, and if again arrested the same process would have to be repeated, and thus the action of the military would be rendered a nullity. * * * To deny the right of the military to detain them when arrested, while engaged in suppressing acts of violence, and until order is restored, would lead to the most absurd results."

The dissenting opinion of Mr. Justice Steele deals with the right to suspend the writ of habeas corpus, and is rich in excerpts from speeches delivered in Congress upon the propriety of the suspension

of the writ of habeas corpus during President Madison's administration. This case did not suspend the writ of habeas corpus; but, upon the contrary, the writ was issued and return made thereto, and the petitioner remanded, the court holding that his detention was legal.

After his release Moyer brought suit in the Federal Court of Colorado against Governor Peabody, for damages. A demurrer was interposed to his declaration, and sustained, and the case certified to the Supreme Court of the United States, who held that the imprisonment of two and a half months under the order of the Governor of the State, without sufficient reason, but in good faith in the exercise of the power under the State constitution and laws to call upon the military arm of the State to suppress insurrection, does not deprive the person imprisoned of his liberty without due process of law, and in the course of its opinion said:

"It is admitted, as it must be, that the Governor's declaration that a state of insurrection existed, is conclusive of that fact. It seems to be admitted also that the arrest alone would not necessarily have given a right to bring this suit. But it is said that a detention for so many days, alleged to be without probable cause, at a time when the courts were open, without an attempt to bring the plaintiff before them, makes a case on which he has a right to have a jury pass. * * * * Of course, the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation. * * * * In such a situation we must assume that he had a right, under the state Constitution and laws, to call out troops, as was upheld by the Supreme Court of the State. * * * * That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. * * * When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. * * * * This was admitted with regard to killing men in the actual clash of arms; and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm. As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the Governor to deprive citizens of life, under such circumstances, was consistent with the Fourteenth Amendment, we are of the opinion that the same is true of a law authorizing by implication what was done in this case. It is unnecessary to consider whether there are other reasons why the circuit court was right in its conclusion."²⁶

(To be concluded in the next number.)

²⁶*Moyer v. Peabody*, U. S.